

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

BARBARA WARNER, et ux.

Plaintiffs,

vs.

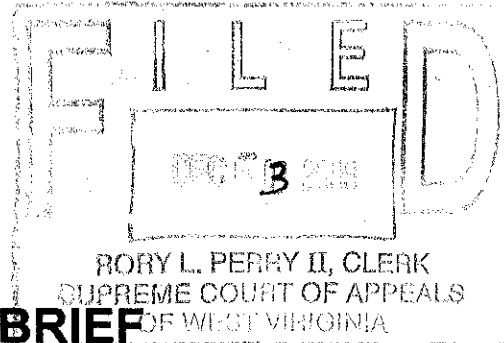
LEROY WINGFIELD, JR., et ux.,

Defendants.

Appeal Number: 081033

CIVIL ACTION NO. 06-C-216

Circuit Court of Randolph County, WV



APPELLANT'S BRIEF

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INTRODUCTION

Roy Warner and Barbara Warner, husband and wife, were at the time of this litigation, neighbors of Leroy Wingfield, Jr. and Susan Wingfield in Randolph County, West Virginia. The parties owned adjacent pieces of property and a dispute arose between the neighbors regarding a dog owned by the Wingfields. This precipitated the parties involvement in a longstanding dispute that unfortunately escalated into several hostile and/or threatening interactions ultimately resulting in the Wingfields erecting a spite fence. The spite fence was on the property line between the Warners and Wingfields property and the Wingfields proceeded to intentionally defaced the portion of the fence facing the Warner's property with spray paint.

STATEMENT OF THE CASE

Barbara Warner and Roy Warner made a decision to retain Attorney Erika H. Klie to represent their interests in a civil suit against the Wingfields.¹ Attorney Klie originally accepted the case on a retainer fee basis. The Warners were scheduled for an initial consultation with Attorney Klie on or about the spring of 2006. Ms. Klie was unfortunately delayed in a hearing and Attorney Klie's paralegal began the consultation with the Warners, obtaining basic general background information as a courtesy to the Warners. Attorney Klie arrived late for the consultation, however, she met with the

¹ Since the dismissal of this lawsuit, the Warners have disputed Attorney Klie's assessment of her representation as did the trial court. However, the nature of Attorney Klie's representation was set forth in detail in the two Memorandums she filed in response to Plaintiff Wingfields Motion for Sanctions and Costs. Additionally, Ms. Klie's staff members, Melissa Daugherty and Brandi Elders also submitted Affidavits which were attachments to Attorney Klie's Response in Opposition to Defendant's Motion for Sanctions.

Warners and was provided with a detailed journal kept by Mrs. Warner and other information including photographs in support of the Warners position.

Attorney Klie drafted a Complaint alleging the counts of invasion of privacy, trespass, assault, tort of outrage and interference with right of way. Throughout the course of preparing the complaint Attorney Klie had several telephone conversations with the Warners to supplement her consultation notes and the detailed journal provided by Mrs. Warner. The respective parties conducted written discovery and depositions. During the discovery phase the initial retainer fee paid by the Warners was exhausted and Attorney Klie agreed to continue representation of the Warners on a contingent fee basis because she understood the Warners could not afford hourly rates.

The Warners throughout litigation were highly emotional, angry and frankly very difficult to communicated with. When discussing relevant legal issues, Mrs. Warner often began to cry and became very emotional. Mr. Warner would become very angry and non communicative. Prior to the depositions, Attorney Klie conducted a three hour deposition prep meeting with the Warners. Attorney Klie attempted on several occasions to resolve this matter with defendants counsel. Attorney Klie urged her clients and the Wingfields to settle this matter by painting over the offensive material on the Warners side of the spite fence and entering into mutual restraining orders. Just prior to commencing the depositions of the Wingfields, Attorney Klie once again attempted to amicably settle this matter. Attorney Klie did so despite the fact that her suggested settlement would not result in a fee and would leave her saddled with non-reimbursable advanced expenses. However, Attorney Klie was informed by the Wingfields counsel that the Plaintiffs would not entertain any settlement offer which did not include

reimbursement of their attorney fees. Following the depositions in this matter, Counsel for the Wingfields, Stephen Jory, filed a motion for summary judgment and motion for Rule 11 sanctions. The certificate of service reflects the same was sent via regular mail and was received by Attorney Erika Klie on March 7, 2007. At this point, Attorney Jory gave the Warners and their counsel twenty one days to dismiss the complaint before he proceeded with the hearing on his motion for sanctions. Attorney Klie immediately held a meeting with her clients to discuss this matter and the current posture of the case. At that meeting, the Warners indicated they would contact Attorney Klie within a few days, to advise as to whether or not they wanted to voluntarily dismiss the case. During this conversation, Attorney Klie and the Warners agreed Attorney Klie would not draft a response in opposition to the Motion for Summary Judgment until the Warners made a final decision on whether or not to voluntarily dismiss their complaint or move forward with litigation. The Warners failed to provide Attorney Klie with any timely response concerning this pressing matter. On March 27, 2008, the twenty first day, the Warners directed Attorney Klie to dismiss their complaint. Attorney Klie filed a Voluntary Dismissal of the complaint on 3/27/2008, faxing the same to Defense counselor Jory; however, she inadvertently filed the voluntary dismissal without having obtained the signature of Attorney Jory. Attorney Klie's office immediately upon learning of the oversight prepared an Amended Voluntary Dismissal on April 2, 2008, and promptly forwarded the same to Attorney Jory's office. Never the less, Attorney Jory proceeded forward with his Motion for Sanctions. Judge Henning held two hearings on Defendant's Motion For Sanctions. The first hearing was held on April 17, 2007 and the Court made a finding and entered an Order indicating sanctions were warranted. The

second hearing was held on August 27, 2007, to determine whether or not sanctions should be assessed against the Plaintiffs, Attorney Erika H. Klie or both. The Court after conducting a Hearing on the Motion, awarded sanctions in the form of the Wingfields' attorney fees in the amount of \$ 12, 236.33 against Attorney Klie. It is from this decision which Attorney Erika Klie appeals. It must be noted, Circuit Court Judge Henning, at both hearings failed to hear evidence and or take any under oath testimony. Rather, the court made a decision and entered an order assessing sanctions based upon the arguments and representations of counsel. Attorney Klie had her two paralegals present, ready and available to offer testimonial evidence. However, the Circuit Court for reasons unknown, failed to permit Attorney Klie any testimony.

**ASSIGNMENT OF ERROR NUMBER ONE - THE TRIAL COURT ABUSED ITS
DISCRETION IN AWARDING SANCTIONS IN THE FORM OF ATTORNEY FEES
AGAINST PLAINTIFFS' FORMER COUNSEL**

ARGUMENT

The standard of review in examining a trial court's award of sanctions in the form of attorney fees is an abuse of discretion. Pritt v. Suzuki Motor Co., 204 W.Va. 388, 513 S.E.2d 161 (1998) citing Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996). It is an abuse of discretion when the trial court's ruling is based upon an erroneous examination of the evidence or of the law. Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996). Attorney Erika H. Klie vigorously maintain the trial court abused its discretion in awarding sanctions in the form of attorney fees as the same were made based upon, in an erroneous examination of the evidence, failure to take any testimonial evidence and/or an erroneous failure to apply the applicable bad faith standard required to award attorney fees as a

sanction. First and foremost the trial court erroneously examined the evidence in failing to take note of any of Attorney Klie's written and/or oral representations to the court and the affidavits of her staff members presenting evidence regarding her preparation of the case at issue.² The court additionally erred and abused its discretion in failing to apply the appropriate standard to Attorney Klie's alleged inappropriate conduct. Whether the trial court properly awarded sanctions is reviewed de novo. Pritt v. Suzuki Motor Co., 204 W.Va. 388, 513 S.E.2d 161 (1998) citing Chrystal R.M. v. Charlie A.L., 194 W.Va. 138, 459 S.E.2d 415 (1995). Court must explain clearly on the record why it believes sanctions are warranted. Pritt v. Suzuki Motor Co., 204 W.Va. 388, 513 S.E.2d 161 (1998) Syl. Pt. 1. An examination of the Court Order in this matter reveals the court erroneously examined the evidence and applied the law.

Rule 11 of the West Virginia Rules of Civil Procedure require that a signature of an attorney on a pleading indicates that the attorney has read the same, the contents to the best of his knowledge is true and that the same has grounds for support and it not being filed for any improper purpose. The Daily Gazette Company, Inc., v. Canady, 175 W.Va. 249, 332 S.E.2d 262 (1985). The Order of the Court in this matter addresses at length the failure of Attorney Klie to adequately investigate this matter. However, the memorandums filed by Attorney Klie with the Court along with supporting affidavits of her staff set forth in detail the steps taken by Ms. Klie in investigating this claim. Her investigation included but was not limited to a consultation meeting, several telephone conversations with the Warners, a review of an extensive journal maintained and provided by Mrs. Warner,

² A review of the transcripts of the hearings and the pleadings in this matter reveal several facts set forth by Attorney Klie placing directly at issue oral arguments and pleadings filed by Attorney Jory.

obtaining and reviewing the files from the Warners' previous attorneys. .

Attorney Klie was placed in an extremely difficult ethical situation. Attorney Klie was forced to defend herself against allegations without breaching attorney client privilege and without undermining her ethical obligation to represent her clients to the fullest. Therefore, the details of her conversations with her clients were not fully revealed to the Court. The Court in its order notes the Complaint was not verified. However, there is absolutely no requirement under West Virginia law for the Plaintiff to verify a Complaint or an Answer. Its worth noting Attorney Jory's clients did not verify by signing his Answer to the Complaint. The Circuit Court alleges and evidently concludes without the basis of any evidence that Attorney Klie failed to investigate the assault count of the Complaint. Quite to the contrary, Attorney Klie discussed the mater at length with her clients and reviewed the detailed and extensive journal/diary of the Plaintiffs. The court indicates Attorney Klie had no explanation for miscommunication but the same would have been a violation of Attorney client privilege. Furthermore, Appellant filed a signed pleading in response to Defendant Jory's allegations detailing her representation and indicating everything she did was undeniably and unquestioningly in good faith. It should be noted the Warners retained two other Attorneys prior to Attorney Klie's representation. One Attorney was fired by the Warners for not being aggressive. It again must be emphasized that the Warners never testified under oath at the hearings in this matter. All assertions made by the Warners in this regard were merely through the argument of their counsel Attorney Jory and the court took these arguments as evidence and based its Order on the same, contrary to applicable West Virginia law concerning sanctions. In fact as previously referenced, there was in fact no evidentiary hearing conducted by Judge Henning, and the court rendered its decision entering an Order

solely on the representations of defendants counsel Jory. The Court indicated it was concerned that Attorney Klie could not produce documentation to support her time spent / hours in this matter. However, there was no documentary evidence as to the time spent because nearly ninety percent of Attorney Klie's time was handled pursuant to the contingency contract. This court is again reminded, Appellant did produce affidavits from her staff detailing the handling of the Warners matter to the court and had her staff ready, willing and available to testify at the hearing. Finally, this Court should be advised that Defense counsel Jory alerted the Circuit Court Judge Henning to Errors in his initial Order that were inconsistent with applicable laws. Attorney Klie is certain if Attorney Jory could have cured the failures of Judge Henning to take evidence at the hearing he likewise would have done so.

As this Court is well aware, A party may be awarded reasonable costs and fees incurred as the result of an attorney's vexatious, wanton or oppressive assertion of a claim not supported by a good faith legal basis. The Daily Gazette Company, Inc., v. Canady, 175 W.Va. 249, 332 S.E.2d 262 (1985). Pritt v. Suzuki Motor Co., 204 W.Va. 388, 513 S.E.2d 161 (1998) Syl Pt 2.

An award of attorney fees as sanctions is appropriate where a party has acted in **bad faith** or for an **oppressive reason**. Pritt v. Suzuki Motor Co., 204 W.Va. 388, 513 S.E.2d 161 (1998). Frivolity of a claim will not alone meet the bad faith requirement to award attorney fees to the opposing party. The Daily Gazette Company, Inc., v. Canady, 175 W.Va. 249, 332 S.E.2d 262 (1985). Appellant asserts that her actions in the instant case were proper at every stage of the proceedings. However, even assuming arguendo her actions are as set forth by the opposing parties allegations at most they merely demonstrate negligence.

The Court Order fails to address what specific conduct of Attorney Klie was done in bad faith or for an oppressive purpose and failed to take any testimony regarding the same. The Order of the court makes note of Attorney Klie's Motions to continue the scheduling conferences in this matter.³ However, Attorney Klie at the hearing of this matter provided information to Judge Henning that she was assisting a small law firm where the senior attorney had recently been diagnosed with cancer and another attorney's spouse was diagnosed with metastatic breast cancer. Ms. Klie was assisting the law firm with their scheduled trials, hearings and depositions at a time where both attorneys were not able to actively practice.

If the trial court is permitted to award sanctions in the form of attorney fees based upon two motions to continue, scheduling conflicts, and the facts and evidence in this case a dangerous precedence is being set. The Circuit Court also made reference to Attorney Klie's failure to file a response to Defense counsel's Motion for Summary Judgment. However, as previously indicated Attorney Klie's clients directed and required her to Voluntarily Dismiss their case therefore, there was no reason to file a Response Opposing Summary Judgement. The Court also made a finding that there was no good faith basis for filing the Complaint in this matter. However, at the hearings on this matter and in her written response Attorney Klie addressed each and every cause of action and why she maintained the same to be valid and reasonable allegations. The mere fact the Court may

³ It should be noted that Attorney Klie filed two Motions to Continue the Scheduling Conference. The first hearing was set by the Court without verifying availability of Attorney Klie. The second date was cleared with Attorney Klie's office; however, Attorney Klie's receptionist, Molly Smith, inadvertently failed to notice a prior scheduled court appearance for Attorney Klie. Ms. Smith called the Court and informed the Court of her mistake and was informed Attorney Klie would need to file a Motion to Continue the hearing.

have dismissed the claims on summary judgment⁴ does not indicate there was not a good faith basis for filing the Complaint. As previously stated, Attorney Klie was limited to argument which did not infringe upon attorney client privilege. Appellant consistently maintained throughout the course of this litigation and still maintains to this day she had a good faith basis for all alleged claims found within the Complaint. Furthermore, the Warners' new counsel has indicated on multiple occasions that it was his legal position that the Warners had a good faith cause of action.

As previously indicated, the Circuit Court its Order focuses on the lack of preparation by Attorney Klie. Additionally, the Court addresses the fact that Attorney Klie could not produce time sheets to verify her time spent on preparing the case. However, Appellant indicated to the Circuit Court she handled the majority of the claim on a contingency basis and therefore had absolutely no reason to keep time sheets. The time estimates provided to the court were based upon the amount of work performed and the work product notes kept by Attorney Klie. A review of the record alone indicates Attorney Klie prepared Answers to Discovery, drafted Discovery Requests to both Defendants, defended the depositions of the plaintiffs, took the depositions of both defendants, attended a scheduling conference and drafted the complaint. Attorney Klie also had her staff ready, willing and available to testify in more detail regarding the time spent on this matter including pre-suit investigation, witness interviews, and client meetings; but were prohibited by the Court from offering said testimonial evidence. Additionally Attorney Klie provided signed Affidavits from both her paralegals, said evidentiary Affidavits were attached to her memorandum filed with

⁴ It is appellants understanding that the Court granted Defendants' Motion for Summary Judgment because Plaintiffs did not file a response. A response was not filed by Plaintiffs because following the depositions, the Plaintiffs directed and required Attorney Klie to Voluntarily Dismiss their Complaint.

the trial court. Furthermore time sheets are not kept in contingency fee matters unless the client is a minor and fees require Court approval.

The Court states sanctions are warranted for filing a frivolous and baseless Complaint. However as previously indicated, frivolity alone is not enough to warrant Attorney sanction and Attorney Klie's complaint was based upon the representations provided to her by her clients and verified by her investigation. The Order of the Court fails to identify any specific conduct of Appellant, Attorney Klie, which was done in bad faith or with an oppressive purpose. Once again, assuming arguendo that all the facts as set forth in the Court Order are true, at most the court could find the conduct of Attorney Klie negligent. Negligence and frivolity are not the appropriate standards to apply in awarding attorney fees as a sanction under Rule 11 of the West Virginia Rules of Civil Procedure.

The court is bound by equitable principles in awarding sanctions. Czaja v. Czaja, 208 W.Va. 62, 537 S.E.2d 908 (2000) Syl Pt. 5. Pritt v. Suzuki Motor Co., 204 W.Va. 388, 513 S.E.2d 161 (1998) Syl Pt 1. In considering awarding sanctions, a court will consider the seriousness of the conduct along with mitigating circumstances. Czaja v. Czaja, 208 W.Va. 62, 537 S.E.2d 908 (2000) Syl Pt. 5. Trial courts are to exercise their sanction power with restraint. Bartles v. Hinkle, 196 W.Va. 381, 472 S.E.2d 827 (1996). In the instant case, the court failed to apply these standards as documented by the Courts Order. First and foremost, it was undisputed that the Defendants in this matter did erect a spite fence and did spray paint the same in an unattractive manner facing Plaintiffs residence.⁵ Second, Appellant attempted on several occasions to settle this matter. The Wingfields failed to conduct any good faith settlement negotiations. They have in essence been

⁵ Counsel for the Warners presented photographs of these actions to the Court and the same was undisputed.

awarded for this conduct by Judge Henning awarding their attorney fees. The assessment of attorney fees in the amount of \$ 12, 236.33 is an excessively harsh sanction, given that Attorney Klie attempted to settle this matter and made a good faith effort to timely Voluntarily Dismiss the Complaint after being placed on notice of Defendants' Motion for Summary Judgment and Motion for Sanctions. Although, Attorney Klie's dismissal was not completely proper in technical form, its worth noting the same dismissal with technical errors was filed by the Warner's new counsel, Jefferson Triplett. Additionally, Appellant provided explanation to the Court in this regard in that she also has an Ohio license, in a hurry to get the Voluntary Dismissal timely filed failed to secure Attorney Jory's consent. This is not required pursuant to the Ohio Rules of Civil Procedure for a Voluntary Dismissal. The trial court additionally failed to make any determination regarding the reasonableness of the fees asserted by the Defendant.

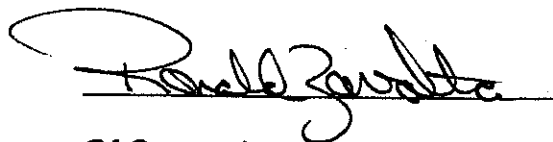
CONCLUSION

There was absolutely no finding by the trial court that Attorney Erika Klie acted in a manner which would warrant a Rule 11 sanction of attorney fees. The court failed to allow Attorney Klie to present evidence nor was evidence presented by any other party on the issues of sanctions, other than the time sheets presented by counsel for the Wingfields. There was no examination by the Court as to the reasonableness of the fees requested by the Defendant. Appellant, Erika H. Klie, asserts the trial court failed to adequately evaluate the evidence in this matter and failed to apply the requisite bad faith standard to her conduct and therefore abused its discretion in awarding sanctions in the form of attorney fees. To uphold the decision of the trial court in this matter would set a dangerous precedent which

would subject any attorney in the State of West Virginia who does not prevail to be subject to sanctions. For all the hereinbefore described reasons, Appellant respectfully request that the Court accepts this Petition and reverse the prior hereinbefore described decision of the lower court.

Respectfully submitted,

Erika H. Klie

A handwritten signature in black ink, appearing to read "Ronald W. Zavolta", written over a horizontal line.

Of Counsel

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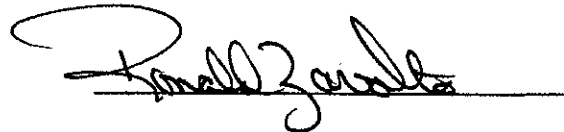
Circuit Court of Randolph County, WV

Defendants.

CERTIFICATE OF SERVICE

Service of APPEALLANT'S BRIEF was had upon the parties herein by mailing true and correct copies, by United States Mail, postage prepaid, this 26th day of November, 2008 to:

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